No. 88-1943

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1989

OFFICE OF PERSONNEL MANAGEMENT,

Petitioner,

v.

CHARLES RICHMOND,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether the federal government may be equitably estopped.

2. Whether the Office of Personnel Management should be estopped in this case because it provided the claimant with an unambiguous, but erroneous, written statement of the law on which he relied to forfeit his vested annuity.

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OFFICE OF PERSONNEL MANAGEMENT,

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BRIEF FOR THE RESPONDENT

STATEMENT OF THE CASE

In January 1986, respondent Charles Richmond, a retired federal employee, visited the office of his former employer, the Navy Public Works Center, specifically to inquire about his continued right to a disability annuity. Concerned as to whether he should accept an unusual opportunity for temporary work, he explicitly directed his inquiry at the rules relevant to the permissible earnings of a disability annuitant.

Both on that occasion and on a later one, the civilian specialists employed to provide assistance to retirees gave him an official publication prepared by the petitioner, the Office of Personnel Management (OPM), which purported to detail the law on earnings for disability

retirees. In fact, the OPM publication was in error, as the law had changed several years before, but Mr. Richmond relied on the unambiguous OPM explanation and undertook the additional work in 1986. As a consequence, his annuity was suspended in 1987.

1. After service as a Green Beret with the United States Army in Vietnam, Mr. Richmond completed a four-year apprenticeship program and became a civilian welder employed by the Navy Public Works Center in San Diego, California. Richmond Appeal to Merit Systems Protection Board (July 3, 1987) (hereinafter "MSPB Appeal").[1] Because of vision problems which were aggravated by the conditions of his welding job, however, he was ultimately forced to seek a disability retirement. Mr. Richmond filed his retirement application with the Navy's Civilian Personnel Department. "Informal Brief of Petitioner," at 3 (June 21, 1988), in *Richmond v. OPM*, No. 88-3243 (Fed.Cir.). Based on this application, OPM determined that his disability prevented him from performing his job and, accordingly, found him eligible for a permanent disability annuity, effective June 6, 1981. Pet. App. 21a.

2.a. Under the federal government's retirement program, a federal employee with five or more years of civilian service who is found disabled by OPM may retire and receive an annuity. 5 U.S.C. § 8337(a). Disability is established when the employee is determined "to be unable, because of disease or injury, to render useful and efficient service in the employee's position and is not qualified for reassignment . . . ." *Ibid.*

If the retiree recovers from his disability or his earning capacity is deemed to have been restored, his annuity is terminated. 5 U.S.C. § 8337(d); see, *e.g.*, *Lancellotti v.*

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[1] At all administrative levels and in the Court of Appeals for the Federal Circuit, Mr. Richmond represented himself. He signed all pleadings and letters in presenting his position and petitioning to those tribunals.

OPM, 704 F.2d 91, 93 (3d Cir. 1983). In the event of restoration of earning capacity, discontinuance of the annuity begins six months after the end of the calendar year in which the earning capacity was considered to have been restored. 5 U.S.C. § 8337(d).

Receipt of the annuity is thus premised on two separate factors, the categorical requirement of disability and the income requirement of lost earning capacity. See *Crockett v. OPM*, 783 F.2d 193, 195 (Fed.Cir. 1986). The latter factor is defined in the statute through a simple, but blunt, measurement: "Earning capacity is deemed restored if in any calendar year the income of the annuitant from wages or self-employment or both equals at least 80 percent of the current rate of pay of the position occupied immediately before retirement." 5 U.S.C. § 8337(d). It is thus an objective limit which changes each year as the "current rate of pay of the position" formerly held by the retiree is enhanced by cost-of-living increases. See, *e.g.*, *McLean v. OPM*, 800 F.2d 254, 255 (Fed.Cir. 1986). Accordingly, retirees who are able to obtain occasional work must seek assistance from the agency in order to keep abreast of the rules and avoid the Draconian all-or-nothing effect of the 80% demarcation line. See *Lancellotti v. OPM*, 704 F.2d at 99-100.

b. Prior to 1983, restoration of earning capacity had a more narrow meaning, thus allowing retirees greater latitude in their earnings. In that incarnation, earning capacity was "deemed restored if in *each of 2 succeeding calendar years* the income . . . equals at least 80 percent of the current rate of pay . . . ." 5 U.S.C. § 8337(d) (1976) (emphasis supplied). A 1982 amendment, Pub. L. No. 97-253, § 302(a)(2), 96 Stat. 792, thus changed the frame of reference from two consecutive one-year periods to a single one-year period. As a result, instead of an annuity continuing when income exceeded the 80% limit in one year, it was terminated after the limit was reached in any given year.

3. After disability forced him to retire from his welding job in 1981, Mr. Richmond found work as a part-time

school bus driver, with average annual earnings of $12,494. Pet. App. 21a; see also Richmond Request for Reconsideration (May 29, 1987), attached as exhibit to OPM's "Informal Brief" (filed July 15, 1988), in *Richmond v. OPM, supra* (hereinafter "Recon. Request"). Because of his continuing disability and because his earnings were considerably below 80% of the then-current pay scale of his former position with the Navy, he received his annuity every year up to 1987.

His income for 1986, though, was $19,936, which was higher than in the past because he had accepted additional work, "overtime that was not available in other years." Pet. App. 12a; see also Pet. App. 21a. As 80% of the 1986 salary for his previous position was $19,016.74, OPM determined that his earnings in 1986 had exceeded the limit and therefore terminated his annuity six months after the end of 1986. Pet. App. 21a. The additional work in 1986 was temporary, however, so that his 1987 earnings were only about $15,000, well below the 80% level; accordingly, since he was still disabled, his annuity was restored in 1988. Pet. App. 1a n.1.

4. The temporary work in 1986 placed his annual earnings about 3.9% above the point at which earning capacity was deemed to be restored. But, by performing this overtime, he lost half of his annual annuity. This seemingly irrational exchange was not caused by a mistake or misunderstanding on his part, but, rather, by the admittedly incorrect information consistently provided to him by his former employer, the Navy, and by the institution responsible for administering his pension, OPM.

This situation had its genesis when his present employer advised Mr. Richmond that there would be an opportunity for extra work for a few months in 1986, but that, because of changes in school schedules, the workweek in 1987 and 1988 would be only about 25 hours. Recon. Request. With this information in mind, in January 1986 he returned to the Navy Public Works Center's Civilian Personnel Department, where he had previously applied for his disability pension, and specifically

inquired about the potential effect of the additional work in 1986. At that meeting, an Employee Relations Specialist informed him that earning capacity was measured by reference to two consecutive years; only if earnings exceeded the limit in each of the two years would earning capacity be deemed to have been restored. This information was confirmed when the Employee Relations Specialist gave him a copy of the official publication of the responsible agency, OPM's Federal Personnel Manual (FPM) Letter 831-64, Attachment 4. Pet. App. 22a; Recon. Request; MSPB Appeal. The FPM Letter had been correct when first published in 1981, but OPM had not changed it in the years between the 1982 amendment and Mr. Richmond's 1986 effort to determine his rights and responsibilities under the law.[2]

Given the opportunity for additional work in one year only, and armed with the "knowledge" that the earning capacity test extended over two years, Mr. Richmond made his decision: "I knew I would not exceed my limit in a two year period because this was a temporary condition, so I took advantage of the [additional] earning[s] to pay past debts and to prepare for the cutback in the 1987-1988 school year." Recon. Request; see also Pet. App. 3a. As the sole support of his wife and two minor children (MSPB Appeal), he thus drew an economically logical conclusion based on his financial situation, the prospect of higher temporary earnings, and the parameters of the earning capacity test which the responsible

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[2] OPM still had not withdrawn or replaced the FPM Letter as of January 1987, when a different Employee Relations Specialist repeated the information and gave him another copy of the same incorrect publication. Recon. Request. Indeed, OPM was so derelict in correcting this crucial misinformation that, when Mr. Richmond set up a new meeting for May 1987, the Civilian Personnel Department asked him to "bring the updated information so that they could make a copy for their files." *Ibid.*

federal agency had explained to him orally and in writing.

Indeed, based on the information imparted to him, his reasoning was impeccable. His wages were not close to the earning capacity limit that, according to OPM, was applicable. In both the years before and after 1986, which were relevant pursuant to FPM Letter 831-64, his earnings were well below the limit; his 1986 income, therefore, should have had no effect on his disability pension. As a consequence of that extra work, however, his wages were slightly over the one-year limit; he therefore lost half of his 1987 annuity because of "misinformation upon which he relied . . . ." Pet. App. 22a.

5. After timely filing his 1986 earnings report with OPM, Mr. Richmond was informed, for the first time, that the earning capacity test was applicable to a single year. Recon. Request. By letter dated May 12, 1987, OPM formally notified him that his 1986 earnings exceeded the limit: "Therefore, you are considered to be restored to earning capacity and are no longer entitled to continue receiving a monthly disability benefit, even though your medical condition may not have changed." Pet. App. 25a. Unlike FPM Letter 831-64, the form letter announcing termination of his annuity explained clearly and succinctly that "a disability annuitant who . . . earns, *in any calendar year*, at least 80 percent of the current rate of basic pay for the position occupied immediately before retirement is considered to be restored to earning capacity." Pet. App. 25a (emphasis added).

Mr. Richmond appealed OPM's decision on the ground that the government should not be permitted to apply the revised § 8337(d) when it had consistently responded to his requests by detailing the terms of the original § 8337(d). This argument was ignored by OPM's Reconsideration and Debt Collection Division (letter of June 12, 1987, attached as exhibit to OPM's "Informal Brief"), and then rejected by an MSPB Administrative Judge. Pet. App. 22a. Upon the MSPB's denial of his

petition for review (Pet. App. 32a), he brought his claim to the Federal Circuit.

6. The majority opinion for the Court of Appeals noted initially that this Court had recently refused to acquiesce in the government's urging that equitable estoppel should never apply to the government. Pet. App. 4a-5a. It then found that the traditional elements of estoppel were satisfied, including that he had reasonably relied on consistently wrong information provided by the government:

> [D]espite his diligence, Richmond remained ignorant of the true state of the law, and relied on the government's representations to his injury . . . .[A]ccording to *all* the information the government had provided Richmond, he was safe in accepting what additional, temporary wages he could earn in calendar year 1986. Richmond thus did not get conflicting advice that could have confused him; he got consistent advice that misled him.

Pet. App. 9a (emphasis in original).

The court also determined that the government's behavior was sufficiently egregious as to satisfy the affirmative misconduct standard, which this Court had long since established as a necessary condition for estopping the government:

> [T]he government's action in providing Richmond with an OPM letter which summarized a law which had been changed some 4 years earlier is sufficient "misconduct" for estoppel to apply. To provide such a letter to an individual who apparently made specific requests for current written information through what appeared to be the correct channels is reckless, at the very least. That it was "affirmative" conduct cannot be disputed.

Pet. App. 9a-10a.

The majority also made several other observations drawing on this Court's estoppel holdings. First, it held that "the logic of the landmark decisions leads to the

conclusion that the most crucial consideration is the objective reasonableness of the reliance." Pet. App. 11a-12a (citation omitted). This case therefore differed from those in which the reliance had hinged on oral advice, or on advice "from persons who were not cloaked with the mantle of authority to speak for the government as to legal requirements." Pet. App. 12a (citations omitted).

Secondly, the majority emphasized that Mr. Richmond's inquiries, and his consequent actions, were reasonable and not manipulative: "[T]his is not a case where . . . an annuitant was offered a raise that would put him permanently over the limit, but asked the employer to decrease the raise in order to stay under the limit so as to maintain eligibility." Pet. App. 12a.

Thirdly, the court recognized the important role that fairness plays in estoppel: "[I]t seems quite unfair to conclude that because of [the government misstatement], estoppel is automatically unavailable. It would seem, rather, that this 'but for' relationship presents precisely the situation where estoppel is most appropriate." Pet. App. 13a.

Finally, the majority concluded that it was incorrect to treat his reliance as unreasonable because of "rigid adherence to the axiom" that everyone is presumed to know the law. Pet. App. 13a. Highlighting the contrast between this recipient of a pension and a corporation doing business with the government, the court noted that "Mr. Richmond is not in the government annuities business and cannot reasonably be presumed to know the specific statutory provisions as they change from time to time." Pet. App. 13a.

Indeed, it was precisely because of his status as an individual untrained in the law, and therefore without the experience necessary to obtain the relevant information, that he sought assistance from the very government sources which are authorized to supply this information, the trained specialists of his former employer and the administrator of the government's pension program.

They provided written confirmation of the relevant rules: "The OPM letter was obviously intended as guidance for all disability annuitants, was printed under OPM's letterhead, was addressed to 'Heads of Departments and Independent Establishments,' and was signed by the Acting Deputy Director." Pet. App. 13a-14a.

In light of these "unusual and extreme" factors, the court below concluded, this was a proper situation for estopping the government: "Estoppel, after all, being equitable, necessarily is based on preserving fairness on the specific facts of the case before the court." Pet. App. 14a.

The dissenting judge believed that estoppel was inappropriate in this instance because of its similarity to other cases in which this Court had declined to estop the government. He contended, for instance, that "*Schweiker v. Hansen*, 450 U.S. 785 (1981) [is] a case strikingly similar to the one we decide today . . . ." Pet. App. 15a. The dissent's legal analysis was also colored in part by a belief that Mr. Richmond did not come before the court with clean hands and was therefore not deserving of equitable relief. Pet. App. 19a.[3]

SUMMARY OF ARGUMENT

1. OPM's bold statements about the history of equitable estoppel in this Court are belied by the reality of events. Not only has the Court consistently refused to state that estoppel of the government is impermissible, but it has, on two occasions, estopped the government.

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[3] OPM has withdrawn its similar allegation of unclean hands. In its request for review, the agency contended that "the heart of this lawsuit" was Mr. Richmond's attempt "to manipulate the law for his personal gain . . . ." Pet. 14. Nothing in its brief on the merits, however, suggests that Mr. Richmond's effort to elicit relevant information from the agency administering his pension was improper.

In a series of decisions, the Court has repeatedly suggested that estoppel would have been appropriate had the government's misconduct so demanded. In particular, in *Schweiker v. Hansen*, 450 U.S. 785 (1981), and *Heckler v. Community Health Services*, 467 U.S. 51 (1984), the necessary implication of the Court's analyses was that, in certain situations, considerations favoring estoppel take precedence over those against estoppel. The lower courts and the commentators have responded by assuming that the government is susceptible to estoppel.

Twice, this Court has in fact estopped the government, as it recognized in *Community Health Services*, 467 U.S. at 60 n.12. In *Moser v. United States*, 341 U.S. 41 (1951), a case structurally identical to this one, the Court employed estoppel language and analysis to conclude that reliance upon misleading information from the government should not cause the loss of a vested right. Similarly, reliance on the responsible agency's long-standing written misinterpretation of a statute served as the Court's basis for prohibiting the government from applying the actual statute in *United States v. Pennsylvania Industrial Chemical Corp.*, 411 U.S. 655 (1973) ("*PICCO*").

2.a. OPM's sweeping view of the effect of sovereign immunity on estoppel ignores the historical development of the two concepts. The latter has evolved as an effective instrument of equity to reconcile competing factors and achieve justice in individual cases. Sovereign immunity, by contrast, has suffered from significant erosion over the years, so that it is no longer viewed as a barrier against estopping the government. Accountability is now considered the more important consideration. The Court's analysis in *Moser* and its willingness to extend benefits to disfavored classifications as a similar remedial tool are indicative of the modern view, which is expressed in this context by a recognition that the tensions are best balanced by rendering it difficult, but not impossible, to estop the government.

Accordingly, because the remedy of estoppel is a procedural device deriving from the equitable powers of

the judiciary, OPM's arguments that no statutory provisions provide a waiver of immunity are irrelevant. Moreover, the agency is mistaken in contending that the exclusion of misrepresentation from permissible torts under the Federal Tort Claims Act bears on the issue of estoppel against the government. Estoppel and the tort of misrepresentation are not comparable concepts, so that no legislative intent regarding estoppel can be inferred from the exclusion.

b. Similarly, OPM's contention that estoppel against the government violates separation of powers principles ignores the development of that doctrine, which is regarded as flexible and realistic. See, *e.g.*, *Mistretta v. United States*, 109 S.Ct. 647, 659 (1989). The limited corrective effect of estoppel does not rise to the level of encroachment by one branch at the expense of another which implicates the separation of powers doctrine. Indeed, estopping the government preserves the separation of powers by ensuring that reckless misdeeds by the executive will not be allowed to defeat the overall will of Congress.

Moreover, the fact that Congress passes legislation which recognizes specific reliance interests does not imply that judicial remedies to correct governmental injustice are impermissible. Estoppel was not crafted to provide relief for every wrong caused by reliance on the government, and the fact that Congress has taken the initiative in some situations does not imply that estoppel is unavailable in all situations.

c. The very notion of estoppel demonstrates that the public interest is served by allowing its application to the government. OPM's dire predictions as to the impact of estoppel have been contradicted by actual experience, as the lower courts for years have accepted the possibility of estopping the government but have applied it only in the most extreme circumstances. It has never been employed in run-of-the-mill situations, and the relevant factors, including affirmative misconduct, will ensure that courts continue to use it sparingly. Past practice and common

sense demonstrate that, in this restrictive application, estoppel causes neither unacceptable administrative burdens nor collusion. Since the purpose of estoppel is to prevent injustice, it is entirely appropriate that this limited remedy remain available in situations where egregious government misbehavior justifies corrective action.

3.a. A number of significant factors distinguish this situation from cases in which this Court refused to estop the government. Here, reliance induced the loss of a vested right and that loss could not be corrected by taking other action. Furthermore, Mr. Richmond sought the crucial information from the right source, and received an unambiguous written statement prepared by the responsible agency. In addition, the government was here acting in a proprietary capacity comparable to the role performed by the administrator of a private pension plan; this was not the government as sovereign.

b. OPM contends that Mr. Richmond's reliance was not reasonable, premising its argument solely on the legal fiction that everyone is presumed to know the law so that it is never reasonable to rely on the government. This Court repudiated that strict axiom in *Moser* and *PICCO*, as it based its conclusion on a review of all the relevant circumstances. Had the Court imputed comprehensive legal knowledge to those claimants, it would have been required to rule against them. Similarly, the Court relied on a number of factors in *Community Health Services*; it did not predicate its refusal to estop the government on an assumption of unrealistic familiarity with the law. Accordingly, courts should presume a reasonable knowledge of the law, and determine the reasonableness of reliance from the totality of circumstances. The court below was thus correct in finding the reliance here to be reasonable.

c. This Court has repeatedly indicated, and the lower courts have accepted, that there must exist an additional factor, affirmative misconduct, in order to estop the government. The most logical and practical interpretation of

that term is that the governmental misconduct should be reckless. Under this standard, estoppel will not apply to everyday instances of negligence but only to those unusual situations where the government's misbehavior, in light of several factors, is considered extreme.

In this case, contrary to OPM's argument, the misconduct went far beyond a mere casual mistake. This was a persistent and ongoing failure of the responsible agency to correct a written statement of the law on which OPM's annuitants were dependent. It is precisely the kind of excessive behavior, as the Court of Appeals found, which warrants applying estoppel in order to preserve public confidence in the government.

ARGUMENT

I. AS THIS AND OTHER COURTS HAVE DETERMINED, IT IS APPROPRIATE, UNDER CERTAIN LIMITED CIRCUMSTANCES, TO ESTOP THE GOVERNMENT

OPM premises its argument on a series of exaggerated characterizations of the law which ignore both the complex history of this issue and the repeated holdings by the federal courts, including this Court, to the effect that estoppel against the government is permitted in limited circumstances. The agency compounds this error by finding support in broad statements of alleged policy, such as its suggestion that estopping the government is akin to allowing the "treasury [to be] raided as a result of the random errors of misinformed employees and officials." Brief for the Petitioner (hereinafter "Gov't Br.") 12.

This implication that permitting estoppel against the government will result in a legion of chaotic attacks on government processes and the public fisc is not just overblown rhetoric; experience has shown it to be factually inaccurate. Between the traditional standards for estoppel, and this Court's additional requirement that the government's action amount to "affirmative misconduct", the

number of instances in which the government has been estopped are, to say the least, infrequent.

It may be accurate to say that the law disfavors estoppel against the government, and certainly it is true that this Court, more often than not, has declined to estop the government. But, as the lower courts and the commentators have consistently noted, the Court has not only failed to hold that there can be no estoppel against the government; it has in fact estopped the government on occasion. OPM has advanced no grounds for holding

> that there are *no cases* in which the public interest in ensuring that the Government can enforce the law free from estoppel might be outweighed by the countervailing interest of citizens in some minimum standard of decency, honor, and reliability in their dealings with their Government.

Heckler v. Community Health Services, 467 U.S. 51, 60-61 (1984) (emphasis in original; footnote omitted).

A. On numerous occasions, this Court has indicated that there exist circumstances in which it is proper to estop the government.

In a series of decisions, the Court has consistently refused to hold that the government may not be estopped and suggested that, in the given case, the government would have been estopped had its misconduct been sufficiently extreme to so warrant. *Montana v. Kennedy*, 366 U.S. 308, 314-315 (1961); *INS v. Hibi*, 414 U.S. 5, 8 (1973); *Schweiker v. Hansen*, 450 U.S. 785, 790 (1981); *INS v. Miranda*, 459 U.S. 14, 17 (1982); *Community Health Services*, 467 U.S. at 60.

In *Hansen*, the Court strongly implied that estoppel against the government was not prohibited. Significantly, it first observed that it had "never decided what type of conduct by a Government employee will estop the Government . . . ." 450 U.S. at 788. It then noted that the lower courts have sometimes decided not to estop the government because of a Supreme Court decision which advised

courts " 'to observe the conditions defined by Congress for charging the public treasury,' " *ibid.* (quoting *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 385 (1947)), and added: "This is another in that line of cases, for we are convinced that [the federal employee's] conduct . . . does not justify the abnegation of that duty." 450 U.S. at 788-789 (footnote omitted). The holding's necessary implication is that, in appropriately limited circumstances, countervailing considerations will permit the abnegation of that duty.[4]

Similarly, the decision in *Community Health Services* represented more than just a refusal to prohibit estoppel against the government, as had been requested. See 467 U.S. at 60. First, the Court noted that the public interest in not having the rule of law undermined has been satisfied by requiring that "the Government may not be estopped on the same terms as any other litigant." *Id.* at 60 (footnote omitted). Again, the unstated but implicit counterpart is that the government will be estopped when those other terms are met.

Secondly, the Court recognized that it had previously decided at least two cases which "seem to rest on the premise that when the Government acts in misleading ways, it may not enforce the law if to do so would harm a private party as a result of governmental deception." *Id.* at 60 n.12. The ramifications of this observation were apparent: since the Court had previously found that the government could not enforce the law in certain situations, it had repudiated the suggestion that there could *never* be circumstances sufficient to relinquish its duty to carry out the will of Congress. This was viewed as a

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[4] See also *id.* at 791 (Marshall, J., dissenting) ("majority goes on to suggest that estoppel may be justified in some circumstances"); *Morgan v. Heckler*, 779 F.2d 544, 546 (9th Cir. 1985) (Kennedy, J.) ("unclear whether the injury complained of here is severe enough to justify estopping the government from enforcing congressionally mandated eligibility requirements").

sufficiently significant statement of the law that two Justices joined in a concurring opinion designed to demonstrate that the decisions at issue had not been premised on principles of equitable estoppel. *Id.* at 68 (Rehnquist, J., concurring in the judgment).

Thirdly, *Community Health Services* confirmed that the fairness considerations long associated with estoppel were also applicable when the government was the responsible party. In addition to the strong suggestion favoring governmental "decency, honor, and reliability", the Court detailed several instances where Justices and judges had previously emphasized the importance of the equitable considerations innate to estoppel. *Id.* at 61 n.13. Given the holding that estoppel was not warranted because not even the traditional elements were met, it is significant that the Court elaborated at length on the equitable principles which provide the analytical framework of the concept.

The lower courts have responded to these analyses by assuming that estoppel against the government is permitted. See 4 K. Davis, *Administrative Law Treatise*, at 17 (2d ed. 1983) [hereinafter *Davis 1983*]; *Portmann v. United States*, 674 F.2d 1155, 1163-1164 (7th Cir. 1982). Indeed, every federal appellate court has either explicitly or implicitly accepted that the government could be estopped in certain circumstances.[5] Similarly, the

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[5] See, *e.g.*, *Boulez v. C.I.R.*, 810 F.2d 209, 218 n.68 (D.C.Cir. 1987); *Best v. Stetson*, 691 F.2d 42, 44 (1st Cir. 1982); *Corniel-Rodriquez v. United States*, 532 F.2d 301, 306 (2d Cir. 1976); *United States v. Asmar*, 827 F.2d 907, 911 & n.4 (3d Cir. 1987); *West Augusta Development Corp. v. Giuffrida*, 717 F.2d 139, 140-141 (4th Cir. 1983); *Fano v. O'Neill*, 806 F.2d 1262, 1265 (5th Cir. 1987); *S.E.C. v. Blavin*, 760 F.2d 706, 712 (6th Cir. 1985); *Azar v. U.S. Postal Service*, 777 F.2d 1265, 1269 (7th Cir. 1985); *United States v. Manning*, 787 F.2d 431, 436 (8th Cir. 1986); *Watkins v. U.S. Army*, 875 F.2d 699, 706 (9th Cir. 1989) (*en banc*); *Emery Mining Corp. v. Secretary of Labor*, 744 F.2d 1411, 1416

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commentators assume that this Court's observations and the lower courts' interpretations have effectively rendered estoppel against the government an established principle.[6]

B. The Court has applied estoppel against the government on two occasions.

In addition to consistently suggesting that estoppel against the government is possible, this Court has at least twice so held. See *Community Health Services*, 467 U.S. at 60 n.12. The first of those was *Moser v. United States*, 341 U.S. 41 (1951), which is structurally identical to the instant case and therefore calls for a similar result.[7]

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(10th Cir. 1984); *Eagle v. Sullivan*, 877 F.2d 908, 910 (11th Cir. 1989); *USA Petroleum Corp. v. United States*, 821 F.2d 622, 625 (Fed.Cir. 1987).

[6] K. Davis, *Administrative Law of the Seventies*, at 404 (1976) [hereinafter *Davis 1976*]; Comment, *Unauthorized Conduct of Government Agents: A Restrictive Rule of Equitable Estoppel Against the Government*, 53 U. Chi. L. Rev. 1026, 1028 (1986) [hereinafter *Restrictive Rule*]; Note, *Equitable Estoppel of the Federal Government: An Application of the Proprietary Function Exception to the Traditional Rule*, 55 Fordham L. Rev. 707, 712 (1987) [hereinafter *Proprietary Function*]; Note, *Estopping the Federal Government: Still Waiting for the Right Case*, 53 Geo. Wash. L. Rev. 191, 191-192 (1984-1985) [hereinafter *Still Waiting*].

[7] OPM argues that *Moser* was not an estoppel case, but an instance of statutory construction. Gov't Br. 40. And this Court framed its analysis as an absence of a knowing waiver of rights. 341 U.S. at 47. But the decision employs estoppel-like language – "led to believe", "justifiable reliance", "misleading circumstances", "elementary fairness" (*id.* at 46, 47) – and courts and commentators generally consider it an application of estoppel principles. See, *e.g.*, *Johnson v. Williford*, 682 F.2d 868, 871 (9th Cir. 1982); *Davis 1983* at 7-9; Note, *Equitable*

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Moser, a neutral alien, signed a form to obtain an exemption from the draft, apparently on the assumption that it would not affect his right to citizenship. *Id.* at 45. Contrary to what he had been led to believe, however, the statute permitted "a choice of exemption and no citizenship, or no exemption and citizenship." *Id.* at 46.

The only difference between *Moser* and this case is the nature of the right at issue. That it was a right to citizenship in one instance, and the right to a pension in the other, is irrelevant for purposes of this analysis. In both situations, the claimant possessed a vested entitlement, and reliance on the specific direction of the responsible government agency induced the individual to take action which, under the statute, deprived him of his vested right. This Court expressly recognized the significance of that point when it observed that *Community Health Services* involved an entirely different circumstance: "[T]his is not a case in which the respondent has lost any legal right, either vested or contingent . . . ." 467 U.S. at 61-62 (footnote omitted). The trailing footnote emphasized the distinction: "This case is, therefore, plainly distinguishable from *Moser* . . . ." *Id.* at 62 n.14.

Moser and Richmond both sought information from the proper source in an effort to determine what steps they could take while preserving an existing vested right. Both were given information which then led them to take the very actions – requesting a deferment and performing additional work – that deprived them of the entitlement which they had set out to protect. Moser's "justifiable reliance" (341 U.S. at 46) is indistinguishable from Richmond's.

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Estoppel of the Government, 47 Brooklyn L. Rev. 423, 435, 440 & n.71 (1981). Furthermore, there is no suggestion that the Court was engaged in statutory construction; its analysis was entirely equitable. The interpretation which OPM purports to infer from the Court's reasoning is far removed from the actual language of the statute.

That the Court did not term its action in *Moser* an estoppel is merely a semantical point, for it is not the terminology, but the underlying principle, that is significant. As Justice Cardozo noted in considering the appropriate nomenclature in another estoppel case:

> The label counts for little. Enough for present purposes that the disability has its roots in a principle more nearly ultimate than either waiver or estoppel, the principle that no one shall be permitted to found any claim upon his inequity or take advantage of his own wrong.

Stearns Co. v. United States, 291 U.S. 54, 61-62 (1934) (citation omitted). Designating the crucial event in *Moser* waiver of a right without full disclosure does not alter its applicability to this situation. Mr. Richmond was also deprived of an intelligent waiver when he was informed that he could engage in work without affecting his vested annuity. Regardless of the terminology, *Moser* and *Richmond* describe structurally identical scenarios, and, having determined that Moser could not be bound because of governmental misconduct, the Court should treat Richmond no differently. As Professor Davis has observed about *Moser*: "[T]he main idea in it is not superseded." *Davis 1983* at 15.[8]

In the second case, *United States v. Pennsylvania Industrial Chemical Corp.*, 411 U.S. 655, 674 (1973) ("*PICCO*"), the Court determined that when the government, by long-standing construction of a statute, had "affirmatively misled" a corporation into believing that

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[8] *Moser* is significant for another reason. The four remaining members of the majority in *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947), including the author, Justice Frankfurter, agreed with the *Moser* analysis. Courts and commentators view *Moser* to have overruled *Merrill*, or at least to have substantially undermined it. See, *e.g.*, *United States v. Lazy FC Ranch*, 481 F.2d 985, 988-989 (9th Cir. 1973); *Corniel-Rodriquez v. United States*, 532 F.2d at 305 n.15; *Davis 1983* at 7.

its actions were not criminal, "traditional notions of fairness inherent in our system of criminal justice prevent the Government from proceeding with the prosecution." That holding is also supportive of Mr. Richmond's position.

In *PICCO*, the corporation followed the written interpretation of the "responsible administrative agency", the function of which "was to guide persons as to the meanings and requirements of the statute." *Ibid*. OPM's printed explanation of § 8337(d) had the same purpose, and was given to Mr. Richmond precisely in response to his request for guidance on the issue. Furthermore, like Mr. Richmond, the company in *PICCO* took action in reliance, only to have the agency belatedly claim that the law was different than the government had portrayed it. For purposes of estoppel analysis, it is not relevant whether the effect of that reliance was criminal prosecution or the loss of a vested right. The key elements are the same regardless of the impact in the particular case.

That the *PICCO* decision rests on equitable estoppel principles is apparent not only from the potential remedy – precluding the government from relying on the actual law – but also from the Court's citation to two law review articles on estoppel and from the discussion as to whether there was reasonable reliance. *Id*. at 674, 675. The suggestion that the government might have "affirmatively misled" the corporation is also consistent with the affirmative misconduct language which this Court has employed in estoppel cases.[9]

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[9] As with *Moser*, OPM attempts to distinguish *PICCO* by claiming that the analysis is based on other grounds, in this instance, due process. Gov't Br. 39-40. Again, however, the language, thrust, references, and intended impact of the decision are all framed in the context of estoppel, not due process. Neither OPM nor the concurring opinion in *Community Health Services*, 467 U.S. at 68, provides any explanation as to why the criminal nature of the proceeding in *PICCO* should preclude an apparent estoppel analysis from being just that.

II. THERE IS NO BASIS FOR NOT ALLOWING ESTOPPEL AGAINST THE GOVERNMENT

A. Sovereign immunity does not bar estopping the government.

1. OPM contends that the principles of sovereign immunity preclude estoppel of the government. Short of an explicit waiver by Congress, OPM argues, this "free-floating remedy for government misconduct" (Gov't Br. 15-16) must be rejected. The argument, however, ignores the history and development of both sovereign immunity and estoppel. The former is not the impregnable fortress which OPM describes, and the reality is and has been for years that, in limited circumstances, the will of Congress is satisfied by allowing courts to employ their equitable powers to correct governmental wrongdoing. Certainly this is the appropriate response when an agency's consistent malfeasance has caused the loss of a vested entitlement.

Estoppel, of course, is a concept of equity, which developed in the English court system. *Payne v. Hook*, 74 U.S. (7 Wall.) 260, 262 (1869). These equitable powers were then conferred on our federal courts by the Constitution.[10] *Noonan v. Braley*, 67 U.S. (2 Black) 278, 281 (1863). It is thus a doctrine "of several hundred years of history." *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944). The nature of these equitable powers allows the courts to balance competing factors in order to obtain a just result:

> The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs . . . .

Ibid.

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[10] "The judicial Power shall extend to all Cases, in Law and Equity . . . ." U.S. Const. Art. III, § 2.

OPM's absolutist view of sovereign immunity, therefore, must be tempered by the recognition that estoppel, as a creature of equity, authorizes courts to exercise considerable power in attaining the proper balance. As one commentator has noted in appraising equity's broad remedial reach:

> The power of the federal courts to grant equitable relief to protect claimants from unconstitutional conduct has always been assumed, and the federal courts have been willing to go to great lengths to make such relief possible. Recent controversies over the Court's authority to issue remedies for constitutional violations have assumed the propriety and importance of anticipatory relief; any debate has concerned damages.

Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 Harv. L. Rev. 17, 85 n.214 (1981).

By contrast, although the doctrine of sovereign immunity also has its origin in English history, it has not maintained its dominant position. Contrary to OPM's suggestion, sovereign immunity has long been discredited as a definitive bar. Justice Frankfurter offered this repudiation of the suggestion that sovereign immunity is the first and last word on actions against the government:

> Whether this immunity is an absolute survival of the monarchial privilege, or is a manifestation merely of power, or rests on abstract logical grounds, . . . it undoubtedly runs counter to modern democratic notions of the moral responsibility of the State. Accordingly, courts reflect a strong legislative momentum in their tendency to extend the legal responsibility of Government and to confirm Maitland's belief, expressed nearly fifty years ago, that "it is a wholesome sight to see 'the Crown' sued and answering for its torts."

Great Northern Life Ins. Co. v. Read, 322 U.S. 47, 59 (1944) (Frankfurter, J., dissenting) (citations omitted). This Court remarked fifty years ago on "the current disfavor of the doctrine of governmental immunity from suit . . . ." *Federal Housing Administration v. Burr*, 309 U.S. 242, 245 (1940). And a commentator has termed sovereign immunity "[p]erhaps the most anachronistic doctrine in Anglo-American public law . . . ." Schwartz, *Estoppel and Crown Privilege in English Administrative Law*, 55 Mich. L. Rev. 27 (1956).

Similarly, the notion of an historical basis for sovereign immunity barring estoppel against the government has been soundly discredited. Raoul Berger, in a seminal article on the issue, explained that English law had been mistakenly tapped as the source:

> Governmental immunity from estoppel, it has been held, is an offshoot of sovereign immunity. That claim may draw some comfort from early English dicta, but such dicta do not represent English law. An English commentator has labelled the notion that the Crown is not bound by estoppel "a prerogative fallacy." In the United States the doctrine of sovereign immunity is in current disfavor and offers uneasy support to doctrines that work hardship and injustice.

Berger, *Estoppel Against the Government*, 21 U. Chi. L. Rev. 680, 683 (1954) (footnotes omitted) [hereinafter *Berger*]. Continuing the assault on the alleged roots of the relationship between estoppel and sovereign immunity, the Ninth Circuit reported that one commentator could find

> no trace of a decision holding that the King is not bound by equitable estoppel . . . . As one English court said . . . : "The Crown cannot escape by saying that estoppels do not bind the Crown, for that doctrine has long been exploded."

United States v. Georgia-Pacific Company, 421 F.2d 92, 99 n.12 (9th Cir. 1970) (citations omitted).

Accordingly, as the courts have recognized that sovereign immunity does not rest on the version of English law previously portrayed, and have also recognized the importance of equitable remedies to protect the public from unjust governmental actions, there has been an increasing tendency not to accede to the axiomatic notion that sovereign immunity bars estoppel of the government. Rather, courts have accepted that the government, no less than private parties, must be accountable:

> [I]t is hardly in the public's interest for the Government to deal dishonestly or in an unconscientious manner. This is especially imperative in a time when few individuals and corporations, if any, can escape numerous dealings with the Government and its agents.

Id. at 100.

It is thus the assumption of courts and commentators that the erosion in sovereign immunity has proceeded to the point that it cannot stand as a prohibition against estopping the government.[11] Professor Davis summarizes the development in these words:

> Over nearly two centuries, Supreme Court law has moved unevenly from a rigid refusal in all circumstances to apply equitable estoppel against the government, to the present somewhat uncertain law that the government may be estopped in some circumstances.

Davis 1983 at 3.

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[11] See, *e.g.*, *Portmann v. United States*, 674 F.2d at 1159; Note, *Equitable Estoppel of the Government*, 79 Colum. L. Rev. 551, 554 & n.25 (1979) [hereinafter *Equitable Estoppel*]; *Proprietary Function*, 55 Fordham L. Rev. at 710; *Still Waiting*, 53 Geo. Wash. L. Rev. at 192.

The fact that this Court has repeatedly refused to state what OPM claims is and always has been the law (see Gov't Br. 13-14) is strong evidence that OPM's contentions about the impact of sovereign immunity are dramatically overstated. With the lower courts repeatedly declaring that there can be estoppel against the government, and with the government repeatedly asking for a resolution of the issue, it is instructive that this Court has consistently declined to resolve the matter as requested – thus effectively permitting the government to remain susceptible to estoppel.

Any doubt as to the limited effect of sovereign immunity in this context is resolved by *Moser*. There, "as a matter of law, the statute imposed a valid condition on the claim of a neutral alien for exemption [from the draft] . . . ." 341 U.S. at 46. That is, the law prohibited anyone who had chosen a draft deferment from asserting the right to citizenship. Moser did exactly that. Yet this Court's decision to ignore his choice of exemption, because of "misleading circumstances" (*id.* at 47), had precisely the result which OPM claims is impermissible under the principle of sovereign immunity: it "prohibit[ed] [the government] from enforcing compliance with law." Gov't Br. 15.

The Court has recognized that equitable considerations provide the rationale for awarding benefits not approved by Congress in other contexts as well. Thus, the typical remedy where a statute is found to violate equal protection guarantees is the extension of benefits to the classification disfavored by the statutory scheme. *Califano v. Westcott*, 443 U.S. 76, 89-90 (1979). By extending benefits, a court is ordering a payment which Congress had not authorized; indeed, Congress had expressly decided not to pay benefits in these circumstances. See *id.* at 94-95 (Powell, J., concurring in part and dissenting in part). But there has been no suggestion that sovereign immunity

does not permit this use of the judiciary's equitable authority:

> [W]e would be inclined to consider [this issue] only if the power to order extension were clearly beyond the constitutional competence of a federal district court. This Court's previous decisions, however, which routinely have affirmed District Court judgments ordering extension of federal welfare programs, suggest strongly that no such remedial incapacity exists.

Id. at 91.[12]

If sovereign immunity is not a sufficient bulwark to preclude a court from ordering relief to a class of people for whom Congress had explicitly determined not to provide benefits, then it surely cannot bar a court's effort to remedy governmental injustice on the far more limited scale implicated by estoppel. This is especially true here, where the court is merely enforcing conformity with the law which, according to the government, was still in existence. The risk of "infringing legislative prerogatives" (*id.* at 92) is considerably less in this situation than in extending benefits to a class for which Congress had expressly refused to authorize payment.

OPM's expansive view of the impact of sovereign immunity on this area sweeps too broadly. Its inflexible and over-simplified assumption that estoppel principles must bow to the allegedly unyielding dictates of sovereign immunity demonstrates an unrealistic perception of how these doctrines have developed and the nature of

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[12] See also Miller, *Constitutional Remedies for Underinclusive Statutes: A Critical Appraisal of* Heckler v. Mathews, 20 Harv. C. R. – C. L. L. Rev. 79, 110 n.144 (1985) (sovereign immunity does not bar extending benefits to disfavored classification because benefits flow from equitable remedy of injunction not from damage award).

their interplay. Sovereign immunity does not lead inexorably to a complete prohibition of estoppel against the government. The better view recognizes the intrinsic tensions between estoppel and sovereign immunity, and resolves them by holding "that the Government may not be estopped on the same terms as any other litigant." *Community Health Services*, 467 U.S. at 60 (footnote omitted).[13]

2. OPM's rigid perception of sovereign immunity leads it to conclude that a court may only apply estoppel where Congress has expressly so consented. Gov't Br. 15-19. As has been explained, however, the courts' capacity to estop the government derives not from Congress but from the authority conferred on the judiciary by the Constitution. In this context, the judiciary is not ordering the extension of unauthorized rights; it is employing its equitable powers to prohibit the government from applying a new law when it has previously asserted that the old law was applicable:

> The estoppel is no more than a procedural device that prevents the government from asserting a defense against a plaintiff's statutorily based claim; thus, there is no need for

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[13] OPM's reliance on *INS v. Pangilinan*, 108 S.Ct. 2210, 2216 (1988) (see Gov't Br. 14), is misplaced. The language quoted from that decision is dictum, for the Court's "[m]ore fundamental[ ]" holding was that Congress had not conferred on the district courts any equitable power in that situation, but had directed them solely to carry out "a specific function." *Ibid.* The lower court in *Pangilinan* was intent on using its presumed equity powers to craft a remedy where none could exist. By contrast, in this instance the court below was simply applying traditional estoppel principles to enforce OPM's stated version of the law. To ascribe to *Pangilinan* the controlling effect suggested by OPM would put it in direct conflict with *Moser* and *PICCO*.

> sovereign authorization. Moreover, the plaintiff is claiming a benefit for which Congress has already allocated resources.

Restrictive Rule, 53 U. Chi. L. Rev. at 1042 (footnote omitted).

Accordingly, OPM's contention that 5 U.S.C. § 7703(c)(1) does not provide a waiver of immunity is irrelevant. Applying estoppel to the government is not an effort to force Congress to pay unobligated benefits; it is instead "an equitable doctrine invoked to avoid injustice in particular cases." *Community Health Services*, 467 U.S. at 59. A court which determines "to protect reliance on a misrepresentation by treating the misrepresentation as true" (Gov't Br. 15) is not countering the will of Congress, but is holding the government to its word.[14]

Similarly, OPM's use of the Federal Tort Claims Act's exclusion of misrepresentation allegedly to demonstrate "that Congress has not conferred general authority upon the courts to estop the government" (Gov't Br. 17) is far removed from the issues of this case. Unlike the tort of misrepresentation, "estoppel has usually been treated as a procedural mechanism that merely precludes a party from asserting a defense, and has not been seen as an independent cause of action that would require the blessing of Congress." *Restrictive Rule* at 1039. This approach is especially appropriate in instances such as this (unlike situations such as *Merrill* and *Community Health Services*),

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[14] In any event, OPM's argument about § 7703(c)(1) is, at best, highly questionable. See Gov't Br. 16. To give explicit written directions in response to a discrete question, on which the asking party reasonably relies to his detriment, would appear to be precisely what the review provision contemplates as the basis for relief: "agency action . . . found to be arbitrary, capricious, [or] an abuse of discretion . . . ."

where the individual "would have qualified for a statutory benefit had the government agent acted properly." *Restrictive Rule* at 1041.

Even if Congress' action with respect to the FTCA could conceivably be relevant, OPM's attempt to infer legislative significance from the exclusion of misrepresentation is too attenuated to be credited. Congress was considering a broad waiver of sovereign immunity with the FTCA, and its decision not to include the tort of misrepresentation offers no insight on the issue of this case. Estoppel and misrepresentation are not the opposite sides of the same coin described by OPM.

B. Estopping the government does not violate separation of powers principles.

OPM argues at great length (Gov't Br. 20-34) that the separation of powers doctrine also prevents estoppel of the government. Its position is essentially a repetition of its sovereign immunity argument, however, for the contention reduces itself to the notion that estopping the government amounts to "an order that the Executive act in violation of the law." Gov't Br. 22.

1. Stripped of its discussion of situations where Congress has expressly legislated in favor of reliance interests (Gov't Br. 24-34), the argument rests solely on the unsupported and unrealistic premise that the three branches of government operate so independently that *any* interference by one branch with the affairs of another violates separation of powers principles. Under this theory, estopping the government effects a dual violation: the actions and words of an executive agency take precedence over the will of Congress, and the judiciary's very order of estoppel is itself an intrusion on the legislative prerogative. Gov't Br. 20-24.

Although OPM cites numerous decisions purportedly supporting this contention, these cases stand only for the unremarkable proposition that estoppel was inappropriate in the given circumstances.[15] This Court has never suggested that the minimal intrusion occasioned by estopping the government is in conflict with principles of separation of powers; *Moser* and *PICCO* demonstrate just the opposite. The Court has consistently emphasized that the separation of powers doctrine is not the simplistic concept embraced by OPM:

> [T]he Framers did not require – and indeed rejected – the notion that the three Branches must be entirely separate and distinct . . . . Madison recognized that our constitutional system imposes upon the Branches a degree of overlapping responsibility, a duty of interdependence as well as independence the absence of which "would preclude the establishment of a Nation capable of governing itself effectively."

Mistretta v. United States, 109 S.Ct. 647, 659 (1989) (citations omitted).

As a consequence of this overriding purpose, the Court has adopted a "flexible understanding". *Ibid.*; see also *Nixon v. Administrator of General Services*, 433 U.S. 425, 442-443 (1977); *Berger*, 21 U. Chi. L. Rev. at 707 ("judicial trend toward realism in applying the separation of powers"). Yet OPM would have the Court invoke a narrow and unyielding approach under which the minor inroad occasioned by estoppel would violate the doctrine:

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[15] For instance, OPM claims that "[e]stoppel of the government thus confers *pro tanto* legislative status on government employees, and effectively overrides Congress's mandates. See *Merrill*, 332 U.S. at 383." Gov't Br. 20. But nothing in the *Merrill* decision, at that page or at any other page, states that separation of powers principles provide the doctrinal underpinning for the holding.

"[S]uch a rigid separation of powers analysis contrasts sharply with the more realistic and flexible judicial approach to separation of powers problems in other areas such as legislative delegation." *Portmann v. United States*, 674 F.2d at 1159. The corrective effect of estoppel carries out the "duty of interdependence"; to equate the judiciary's limited remedial action with the "encroachment and aggrandizement that has animated our separation-of-powers jurisprudence" (*Mistretta*, 109 S.Ct. at 659) is to miss the point of that doctrine altogether.

OPM's approach allows no flexibility. It opines that to permit an estoppel against the government is a *per se* elevation of the executive and the judiciary to a position above the legislature. But such an analysis ignores reality. Forcing compliance with what the executive agency incorrectly advised in an individual case does not cause, lead to, or even imply "encroachment and aggrandizement"; it simply seeks to correct a wrong for which the government, as a whole, is responsible. It does not, by any stretch of the imagination, "involve an attempt by [one branch] to increase its own powers at the expense of [another branch]." *Morrison v. Olson*, 108 S.Ct. 2597, 2620 (1988).[16]

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[16] Even OPM does not suggest that permitting estoppel of the government would lead to wholesale efforts by executive employees to thwart the will of Congress. Only such a broad-based effort could conceivably work the kind of intrusion which would threaten the separation of powers. By definition, however, estoppel is "invoked to avoid injustice in particular cases," *Community Health Services*, 467 U.S. at 59, and its application on a case-by-case basis cannot plausibly result in a repudiation of legislative privileges by the executive or the judiciary.

Indeed, as several commentators have noted, estopping the government operates not to subvert the separation of powers, but to uphold it by effecting the greater legislative purpose.[17] As one explains:

> [A] no estoppel rule permits the executive branch to undermine legislative programs – and thus the separation of powers – simply by intentionally or unintentionally misinforming the public. Thus, the application of estoppel . . . can be understood as preserving the separation of powers by ensuring that executive officials cannot block benefits from going to those whom Congress intended to have them.

Restrictive Rule, 53 U. Chi. L. Rev. at 1043.

Thus, it is precisely in those rare circumstances where estopping the government is appropriate because of affirmative misconduct that estoppel operates most effectively to uphold the separation of powers. When the agency's misrepresentation is intentional or reckless, a no-estoppel rule would have the effect of allowing the executive to defeat the will of Congress. *That* is the kind of encroachment which the separation of powers doctrine is intended to prevent. Estopping the government avoids that intentional intrusion on the legislature's prerogatives. See *id.* at 1045.

2. OPM's detailed explanation of how Congress periodically, through public and private bills, recognizes specific reliance interests proves only that Congress has decided, in a variety of circumstances and for a variety of reasons, to supplement the judiciary's remedial powers. It

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[17] See *Restrictive Rule*, 53 U. Chi. L. Rev. at 1043-1045; *Equitable Estoppel*, 79 Colum. L. Rev. at 566; *Still Waiting*, 53 Geo. Wash. L. Rev. at 202; Note, *Equitable Estoppel: Does Governmental Immunity Mean Never Having to Say You're Sorry?*, 56 St. John's L. Rev. 114, 135 (1981) [hereinafter *Governmental Immunity*].

is a recognition that estoppel's limitations – which are not in dispute – will permit wrongs to go unremedied in the absence of intervention by Congress.

For instance, the statutes allowing waiver of overpayment recoveries in federal benefit programs (see Gov't Br. 25) recognize reliance interests which estoppel could not remedy because, as in *Community Health Services*, 467 U.S. at 62 & n.14, the recipient had no vested right to those benefits. Similarly, the recent legislation responding to the type of situation described in *Hansen* (see Gov't Br. 36 n.37)[18] is a perfect illustration of Congress providing a remedy which, for the reasons outlined in *Hansen*, the judiciary is powerless to confer.

No one contends that estoppel provides an all-encompassing mechanism for correcting the mistakes of the executive; as the decisions demonstrate, there are many situations where estoppel against the government is impermissible. Accordingly, additional and specific procedures authorized by Congress are appropriate complements to the traditional remedies. At the same time, however, the fact that Congress takes specific action in some instances does not imply that legislation is the exclusive means for resolving incidents of injustice. Accord, *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 396-397 (1971).

C. Estoppel of the government serves the public interest.

Despite the fact that estoppel is intended "to avoid injustice," *Community Health Services*, 467 U.S. at 59, and that "the dictates of both morals and justice" support its

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[18] Pub. L. No. 101-239, § 10302, 103 Stat. ___ (1989).

application, *Georgia-Pacific Company*, 421 F.2d at 103,[19] OPM also argues that estopping the government runs contrary to the public interest. Its premise is that allowing estoppel of the government would overwhelm the government's ability to carry out its duties due to the "enormous potential liability" and the "invitation to fraud" which it would engender. Gov't Br. 34, 35. These contentions are without factual support; quite to the contrary, estopping the government can only be in the public interest:

> Confidence in the fairness of the government cements our social institutions. No pinch-penny enrichment of the government can compensate for an impairment of that confidence, for the affront to morals and justice involved is the repudiation of a governmental representation.

Berger, 21 U. Chi. L. Rev. at 707.

Allowing the government to be estopped does not have the dire consequences predicted by OPM. Proving the traditional standards for estoppel presents a difficult hurdle for most potential claimants. And the additional requirement of affirmative misconduct, which eliminates claims based on simple negligence, drastically cuts the number who can legitimately make the argument. See *Equitable Estoppel*, 79 Colum. L. Rev. at 560; *Restrictive Rule*, 53 U. Chi. L. Rev. at 1046-1047. Because the courts have assumed that estoppel against the government is permitted, it is not a question of mere speculation as to how estoppel might affect the government; there is considerable evidence that the factors necessary to prove an

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[19] See also, *e.g.*, *Community Health Services*, 467 U.S. at 61 & n.13; *United States v. Wharton*, 514 F.2d 406, 412-413 (9th Cir. 1975); accord, *United States v. Morgan*, 307 U.S. 183, 194 (1939) (equating decision to grant equitable relief with "the public interest involved").

estoppel are sufficiently "unusual and extreme" (Pet. App. 14a) that estopping the government is a rare event.[20]

OPM's misunderstanding on this point is caused by its confusion as to the crucial facts of this case and the general principles for applying estoppel. Estoppel is not appropriate in run-of-the-mill situations, such as when individuals have casual conversations with government employees or "simply take[ ] home . . . circulars that turn [ ] out to contain out-of-date information." Gov't Br. 35. The information on which Mr. Richmond relied, however, was of a qualitatively different caliber. It was in writing; it was prepared by OPM officials in Washington precisely in order to explain the operation of the law on post-retirement work; it was given to him in direct response to a specific question on the issue; and it had not been corrected despite the passage of several years. It was not a mere pamphlet lying around the office which an annuitant mistakenly stumbled upon; it was the very item to which both the government and the retiree were directing their attention – and it was blatantly in error.

Estopping the government in the rare case such as this does not take advantage of the government's inability "to exercise complete control over every one of its millions of employees and agents." Gov't Br. 34. This is not an instance where an individual employee casually gave out incorrect information, or where there is any dispute as to what information was provided. Here, the

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[20] The relevant portion of the 1988 "cumulative annual pocket part" to 35 *Federal Practice Digest 3d* ("key number" 62.2(4)), roughly covering the years 1984 through 1988, discloses that, of 62 reported estoppel decisions rendered by the appellate courts in that period, the government was estopped in only one.

agency *itself* was responsible for dispensing prepared written information which could have been corrected at any time.

Furthermore, susceptibility to estoppel will not require OPM to police its many employees in order to prevent mistakes from occurring; instead, it will encourage the agency to ensure that it does not provide the wrong information as a matter of course. Uncontroverted incidences are the most appropriate for estoppel (see *Davis 1983* at 11, 20), and agency-wide distribution of printed misinformation is a particularly egregious example of this genre. By contrast, simple oral misstatements generally do not result in estoppel. See, *e.g.*, *Rider v. U.S. Postal Service*, 862 F.2d 239, 241 (9th Cir. 1988), cert. denied, 109 S.Ct. 2430 (1989).

Similarly, OPM's claim that allowing estoppel of the government would encourage fraud (Gov't Br. 35) is more overstatement: "[T]he amount of 'improper collusion' by federal officers has been remarkably small." *Berger*, 21 U. Chi. L. Rev. at 684. Moreover, the limitations on the availability of estoppel, especially that the misinformation must generally be in writing, render the chances for fraud in this context considerably few. See *Community Health Services*, 467 U.S. at 65.

Even if there is some remote possibility of collusion to obtain the advantages of an estoppel, prohibiting estoppel is not the appropriate response. In the limited form in which it is applicable to the government, estoppel has significant positive policy consequences: it does justice to the injured individual; it ensures "some minimum standard of decency, honor, and reliability" for the public (*Community Health Services*, 467 U.S. at 61); and it provides an incentive for agencies to correct or prevent major misrepresentations. The minimal fraud which it might encourage is better remedied by application of

criminal sanctions than by negating the doctrine altogether. *Restrictive Rule*, 53 U. Chi. L. Rev. at 1035; *Berger*, 21 U. Chi. L. Rev. at 684.

OPM's public interest argument is, in the end, contradicted by the history of estoppel. The agency's speculation as to what might happen "[i]f estoppel were permitted" (Gov't Br. 34) is undercut by the fact that for years the Courts of Appeals have interpreted this Court's decisions to permit estoppel. See, *e.g.*, *Davis 1976* at 399; *Proprietary Function*, 55 Fordham L. Rev. at 712. Applying one variant or another of the exacting formulation indicated by this Court's opinions, those courts have estopped the government only in very limited circumstances. As a matter of fact, therefore, none of OPM's exaggerated fears have come true, so that there is no public interest in prohibiting estoppel of the government. To the contrary, the public interest is only served by allowing the possibility of estopping the government.

III. IT WAS APPROPRIATE TO ESTOP THE GOVERNMENT IN THIS INSTANCE

A. This case has all the elements which support estoppel of the government.

Through the years, this Court has cited a variety of reasons as to why, in a given situation, estoppel of the government was improper. In this case, however, all the relevant factors support estoppel.

First, unlike the claimants in such cases as *Community Health Services* and *Hansen*, the misconduct here caused the claimant to lose a vested right. Far from being lulled into accepting funds to which he was not entitled (see, *e.g.*, *Community Health Services*, 467 U.S. at 61), Mr. Richmond was induced to take action which deprived him of his existing entitlement. This is precisely the basis on which the Court distinguished *Moser* from *Community*

Health Services: loss of a vested right. 467 U.S. at 62 & n.14.

Furthermore, again unlike in *Hansen*, 450 U.S. at 789, and *Community Health Services*, 467 U.S. at 62 & n.15, after Mr. Richmond had acted in reliance on the government, the consequences could never be corrected, another reason favoring estoppel. See, *e.g.*, *Proprietary Function*, 55 Fordham L. Rev. at 715. His acceptance of the additional work deprived him of his annuity; he could not alter the outcome simply by returning the money or filing an application. The claimants in *Hansen* and *Community Health Services* relied passively by doing nothing to affect an eligibility which they had never possessed in the first place, but Mr. Richmond took the very action which deprived him of existing eligibility. Again, this is structurally the same as the affirmative step taken in *Moser*, where the act of signing the request for deferment deprived Moser of his entitlement to citizenship status.

Also, as previously noted, the reliance in this case was on a written instrument which had been prepared and disseminated by the responsible agency.[21] It was provided in response to a discrete inquiry about the very concern which ultimately was used against him. This situation did not involve a casual remark which the claimant might have misinterpreted, see, *e.g.*, *Montana v. Kennedy*, 366 U.S. at 314, nor is there any indication that Mr. Richmond may have confused or misled the government employees. See, *e.g.*, *Hansen*, 450 U.S. at 789. It is

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[21] It was not generated by a local employee who simply made a mistake in compiling the information. See, *e.g.*, *Morgan v. Heckler*, 779 F.2d at 545. The writing at issue was an official agency document which purported to state the law that OPM administers.

precisely this kind of written response which OPM should have carefully considered, for "[w]ritten advice . . . requires its author to reflect about the nature of the advice that is given to the citizen, and subjects that advice to the possibility of review, criticism, and reexamination." *Community Health Services*, 467 U.S. at 65. Even minimal reflection should have led to a correction within some reasonable period after the law was changed.

In addition, Mr. Richmond was seeking information from the proper source, his former employer, which had a department whose precise purpose was to assist retirees and which had previously accepted his retirement application. His question was a simple one, requiring no interpretation or analysis. In response he received a straightforward, unambiguous statement, the "authoritative interpretation" of the responsible agency itself. See *Berger*, 21 U. Chi. L. Rev. at 691. This situation is in direct contrast to that in *Community Health Services*, where an institution familiar with the bureaucracy of federal funding relied on the interpretation of complex federal regulations provided by a private company, without attempting to obtain an opinion from the government itself. See 467 U.S. at 64-65.

Finally, the misconduct in this case occurred when the government was acting in its proprietary, rather than sovereign, capacity. It was not dispensing welfare benefits, or in any other way acting in a manner peculiar to a government. Mr. Richmond was employed as a welder; when he became disabled, he sought a retirement annuity from his employer. This relationship is exactly as it would have been if Mr. Richmond had worked for a private company: upon retiring, he, like someone in private

industry, received a pension as deferred compensation for his services.[22]

Some courts and commentators contend that estoppel against the government is especially appropriate when the government is acting in a proprietary capacity.[23] As Professor Davis succinctly puts it: "[I]f law has been carefully worked out to require an insurance company to be fair to the insured, why should Uncle Sam in the insurance business be exempt from that law?" *Davis 1983* at 7. Accordingly, the proprietary nature of the government's role vis-a-vis Mr. Richmond also favors application of estoppel.

B. OPM cannot demonstrate that Mr. Richmond's reliance was not reasonable.

OPM's only contention that Mr. Richmond did not meet the traditional standards for estoppel is that his reliance was not reasonable. The agency thus accepts that

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[22] See *Davis v. Michigan Dept. of Treasury*, 109 S.Ct. 1500, 1504 (1989) (civil service retirement benefits as deferred compensation); *Inland Steel Co. v. NLRB*, 170 F.2d 247, 251 (7th Cir. 1948), cert. denied, 336 U.S. 960 (1949) (private pension benefits as wages).

[23] See, *e.g.*, *Portmann*, 674 F.2d at 1161-1162; *FDIC v. Harrison*, 735 F.2d 408, 411 (11th Cir. 1984); *Proprietary Function*, 55 Fordham L. Rev. at 708-709. It has been suggested that *Merrill* repudiated this distinction, as the Court refused to estop the government on an insurance matter (see, *e.g.*, *Phelps v. FEMA*, 785 F.2d 13, 17 (1st Cir. 1986)), but there is language in *Merrill* suggesting that the government was not there acting in a proprietary capacity. See 332 U.S. at 383 n.1. In any event, *Moser* stands clearly for the proposition that the government may be estopped in any situation, as it involved the particularly sovereign capacity of conferring citizenship. Accord, *United States v. Lazy FC Ranch*, 481 F.2d at 989.

the other factors are satisfied. See *Community Health Services*, 467 U.S. at 59 & n.10.[24] Indeed, except for a legal fiction, OPM concedes that the reasonableness element is also met.

The legal fiction is that citizens are presumed to know the law; accordingly, "reliance on the words of a government employee that contradict the terms of a published statute or regulation can never be 'reasonable' . . . ." Gov't Br. 44. Literal application of this proposition, however, would have the effect of preventing the government from ever being estopped when it gives out incorrect information about the law. *Azar v. U.S. Postal Service*, 777 F.2d at 1270. Since "the proper office of legal fictions is to prevent, rather than to create, injustices", *United States v. Markgraf*, 736 F.2d 1179, 1187 (7th Cir. 1984) (Posner, J., dissenting from denial of rehearing *en banc*), cert. dismissed, 469 U.S. 1199 (1985), this is a peculiar result for a doctrine intended to remedy unfairness.

Moreover, literal employment of this fiction would have a staggering impact on governmental operations. Since answers from the government could *never* be trusted, individuals would be forced to retain lawyers to obtain the most basic information. Even Social Security recipients would be advised to refrain from seeking assistance from the Social Security Administration, as the responses would be legally meaningless. A legal fiction with this impact on the relationship between the government and its citizens can hardly be in the public interest.

It is true, however, that the *Merrill* majority employed this fiction in an exacting manner, for it refused to estop a federal agency on the ground that

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[24] OPM no longer contends that his reliance was not detrimental. See Pet. 14-15.

farmers should have read and understood the Federal Register. 332 U.S. at 385. But this position has not been followed through the years.[25]

Moser directly repudiates it. Not only did this Court not impute knowledge of the law to Moser, but the very form which he signed included a footnote quoting the statutory prohibition against citizenship for those who sought exemption from the draft. See 341 U.S. at 44, 46. Even with easy access to the law itself, Moser was not presumed to have knowledge of it. See *Davis 1983* at 9.

In addition to this implicit contradiction of *Merrill*, *Moser* is also significant because the Court there emphasized the circumstances under which the misinformation was provided. Rejecting the relevance of the fact that there was information which arguably could have alerted Moser, the Court stated: "[T]hese are minor distractions in a total setting which understandably lulled *this* petitioner into misconception of the legal consequences of applying for exemption." *Id.* at 46 (emphasis in original); see also *id.* at 47 ("[c]onsidering all the circumstances of the case . . . ."). In short, the crucial determinant is not a pretense that every individual possesses an omniscient

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[25] Justice Jackson's rejoinder in dissent emphasized the irrationality of such a position:

> [I]t is an absurdity to hold that every farmer who insures his crop knows what the Federal Register contains or even knows that there is such a publication. If he were to peruse this voluminous and dull publication as it is issued from time to time in order to make sure whether anything has been promulgated that affects his rights, he would never need crop insurance, for he would never get time to plant any crops.

Merrill, 332 U.S. at 387 (Jackson, J., dissenting).

knowledge of the laws, but, rather, evaluation of all relevant factors in a given case to determine what degree of legal sophistication was reasonable and therefore whether reliance was reasonable. This approach is consistent with the overall premise of estoppel, "a hallmark of [which] is its flexible application . . . ." *Community Health Services*, 467 U.S. at 59; accord, *Equitable Estoppel*, 79 Colum. L. Rev. at 564; *Still Waiting*, 53 Geo. Wash. L. Rev. at 204-205.

PICCO is similar. There, despite the fact that the statute prohibited the very conduct carried out by the corporation, this Court allowed the claimant to show that its actions "were made in good-faith belief that they were permissible under law." 411 U.S. at 673. In short, the law itself was of less importance than what the company had been led to believe was the law. The Court determined that the information on which the company relied had the "designed purpose . . . to guide persons as to the meaning and requirements of the statute," *id.* at 674, which is precisely what the FPM Letter in this instance was intended to do.

Furthermore, *PICCO* involved a large and presumably sophisticated for-profit corporation, conversant with federal bureaucracies and laws and with access to experienced attorneys. In light of these factors, the Court's decision to elevate the agency's mistaken explanation of the law over the law itself gives a strong message that, as in *Moser*, all the relevant circumstances must be considered.

Even the language in *Community Health Services* from which OPM derives great import (see Gov't Br. 44, 45) must be tempered by a recognition that this Court did not reject the claim of estoppel because the company was presumed to know the law. Rather, the Court looked at

the considerations relevant to *this* claimant and *this* instance of misinformation: "Nor was the advice given under circumstances that should have induced respondent's reliance." 467 U.S. at 64. Thus, it was relevant to the question of reasonableness that the company was a recipient of public funds, that it was familiar with fiscal intermediaries, that it knew the intermediary was merely a "conduit [which] could not resolve policy questions," and that it failed to seek resolution from the government agency itself. *Id.* at 64-65. These factors led the Court to conclude that this was "not the kind of reasonable reliance that would even give rise to an estoppel against a private party." *Id.* at 66.

Community Health Services, therefore, does not stand for the proposition that all legal knowledge is presumed and therefore reliance on contrary information is always unreasonable. Rather, like *Moser* and *PICCO*, it acknowledges that each claimant and each situation require a separate analysis. Some degree of presumed knowledge may be acceptable, but it will have a different significance in each case – with the different circumstances of each case determining its relative importance.

Accordingly, the strict holding in *Merrill* has generally been rejected in favor of a flexible approach which recognizes different levels of experience with governmental processes and thereby serves the equitable purposes of estoppel. See *Equitable Estoppel*, 79 Colum. L. Rev. at 564-565; *Governmental Immunity*, 56 St. John's L. Rev. at 140-141. Assuming a reasonable knowledge of the law places some burden on the claimant to attempt to ascertain, as dictated by the circumstances, what the law is, but does not demand an unrealistic knowledge.

This is precisely the approach of the court below, which, after reviewing these authorities, determined that

"the most crucial consideration is the objective reasonableness of the reliance. *Community Health Services*, 467 U.S. at 64, 65." Pet. App. 12a. Recognizing that Mr. Richmond is not comparable to sophisticated institutions which have attorneys and which deal regularly with government bureaucracies, the majority took a commonsense view of his actions. Pet. App. 13a. He went to the office which had previously assisted him with issues regarding his retirement; he met with the people whose job it was to handle retirement issues; he asked specific questions about the effect of additional work on his annuity; and, in response, he was given a printed, clear-cut explanation prepared by the administrator of the retirement program. Unlike the events in *Community Health Services*, there was not one step in this process which should have put him on notice that the information was sufficiently suspect to warrant taking additional action. See 467 U.S. at 65-66.[26]

Mr. Richmond's actions in obtaining information were reasonable, and it was reasonable for him to rely on that information. OPM's extremist view of presumed

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[26] Since Mr. Richmond did attempt to enlighten himself about the relevant law, it would be especially ironic if his reliance on the information received were the basis for the loss of his annuity. In the case of a retiree who, in contrast, made no inquiries into the post-retirement work rules, the Merit Systems Protection Board has held that OPM may have had an affirmative obligation to notify annuitants of the change in the earning capacity rule. *Jones v. OPM*, 37 M.S.P.R. 99, 102 (1988). The individual who acted most responsibly should not be treated more harshly than those who took no action.

knowledge must be rejected if the flexible nature of estoppel is to have any meaning.[27]

C. Affirmative misconduct is an established factor in the estoppel equation, and OPM's actions here rose to that level.

1. Consistent with its view that the government may not be estopped, OPM argues that there is no affirmative misconduct element. Gov't Br. 39-43. For all practical purposes, however, this issue has been resolved, as this Court and the lower courts have repeatedly held to the contrary.

For nearly thirty years, since *Montana v. Kennedy* in 1961, the Court has regularly indicated that only some

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[27] Moreover, refusing to estop the government in this case would implicate procedural due process concerns. Where a change in the law threatens the extinguishment of a vested right, the owner must be given sufficient opportunity to conform his conduct accordingly. *Atkins v. Parker*, 472 U.S. 115, 130-131 & n.34 (1985); *Hodel v. Irving*, 107 S.Ct. 2076, 2092 & n.18 (1987) (Stevens, J., concurring in the judgment). Not only did OPM fail to take the feasible step of notifying the discrete class of disability annuitants about the change in law, see *Texaco, Inc. v. Short*, 454 U.S. 516, 550 (1982) (Brennan, J., dissenting); *Jones v. OPM*, 37 M.S.P.R. at 102, but the information provided on request was incorrect. "[A]n enactment that relies on th[e] presumption of knowledge must evidence some rational accommodation between the interests of the State and fairness to those against whom the law is applied." *Texaco, Inc. v. Short*, 454 U.S. at 544 (Brennan, J., dissenting). Distributing a defective explanation which causes the loss of property rights violates the essence of this accommodation.

level of "misconduct" beyond that implied by the traditional factors will give rise to an estoppel against the government.[28] The lower courts have generally adopted that standard.[29] This additional requirement for estopping the government has the effect of limiting the circumstances in which estoppel will be available and thus restricting the government's liability to only the most egregious situations. *Equitable Estoppel*, 79 Colum. L. Rev. at 560; *Restrictive Rule*, 53 U. Chi. L. Rev. at 1046-1047.

The real issue is the nature of this misconduct, which has been labeled "affirmative" since 1973. See *Hibi*, 414 U.S. at 8. There is consensus that something beyond mere negligence is required, see, *e.g.*, *Morgan*, 779 F.2d at 545; *Fano*, 806 F.2d at 1265, but affirmative misconduct generally does not require a showing of intentional misbehavior. Thus, the Fifth and Second Circuits have found affirmative misconduct in an agency's failure to carry out a required procedure, *id.* at 1266; *Corniel-Rodriquez*, 532 U.S. at 307, and the Ninth Circuit has deemed a pattern and practice of misleading actions to be affirmative misconduct. *Watkins*, 875 F.2d at 707-708.

This view of affirmative misconduct is the most logical. It recognizes that the government cannot be accountable for every instance of negligence. At the same time, it

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[28] *Montana*, 366 U.S. at 314-315; *PICCO*, 411 U.S. at 675; *Hibi*, 414 U.S. at 8; *Hansen*, 450 U.S. at 790; *Miranda*, 459 U.S. at 19.

[29] See, *e.g.*, *Watkins v. U.S. Army*, 875 F.2d at 707; *United States v. Asmar*, 827 F.2d at 912; *Fano v. O'Neill*, 806 F.2d at 1265; *Corniel-Rodriquez v. United States*, 532 U.S. at 307. But see *Azar v. U.S. Postal Service*, 777 F.2d at 1271 (no showing of affirmative misconduct necessary to estop the postal service).

does not require the claimant to prove an intentional effort to deceive. Such a requirement would be so demanding as to preclude success on virtually any claim of estoppel. Rather, a showing of "reckless" behavior should be sufficient to satisfy this standard. See *Restrictive Rule*, 53 U. Chi. L. Rev. at 1044 & n.78; Pet. App. 10a, 14a.

A more detailed definition of affirmative misconduct is neither warranted by this case nor necessary for future analysis. Like estoppel in general, there can be no objective test which easily resolves every situation; "each case must be decided on its own particular facts and circumstances." *Watkins*, 875 F.2d at 707 (citation omitted). The existence of affirmative misconduct should thus depend on balancing a variety of factors, such as who provided the information, in what form, when, to whom, and in response to what kind of inquiry. These and other considerations cannot realistically be incorporated into a single definition. The complexities inherent in a flexible concept such as estoppel preclude establishing narrow guidelines.

2. OPM's contention that there was no affirmative misconduct in this situation is dependent on a misleading description of events. The agency refers to the "misrepresentations made by the Navy employees" and terms the mistakes made here "careless" and mere instances of "negligently pass[ing] on misinformation in writing." Gov't Br. 46-47. The deliberate and false implication is that the misconduct was a typical example of individual employees making the kinds of mundane mistakes which must be condoned as a necessary ingredient of governmental operations.

This situation, however, was not the result of temporary carelessness by low-level government workers, nor does it describe a tolerable degree of wrongdoing. For

that reason, and contrary to OPM's argument (Gov't Br. 46), it is not comparable to *Hansen*. The crucial mistake here was an ongoing failure by the responsible federal agency to correct its main channel of communications with annuitants. For over four years, OPM disseminated, in writing, erroneous legal information. Remedying that would have required a simple rewriting of one sentence of the offending publication, an act which the agency did accomplish on its form notifying annuitants that their earning capacity had been restored. See Pet. App. 25a. The misconduct here went far beyond a few careless casual remarks; it was a persistent failure by the responsible agency itself to supply the correct rule for those needing that information.

Mr. Richmond made the right inquiries to the right people. They responded, in writing, with the official statement of the administering agency – which had maintained a blatantly erroneous position for years. As the court below found, this unexplained and consistent failure is "reckless, at the very least." Pet. App. 10a.

Hansen involved the one-time oral misstatement of a single government employee. This situation differs in every relevant respect. OPM's flagrant and persistent disregard of its obligations to those dependent on it depicts a prototypical instance of why estoppel is "necessary to preserve public confidence in government." *Restrictive Rule*, 53 U. Chi. L. Rev. at 1045.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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